86-661

Supreme
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NO.

IN THE SUPREME COURT
OF THE UNITED STATES
OCTOBER TERM, 1986

JOHN PATRICK ALLEN, and ALEXANDRA GEORGEO,

Petitioners,

V.

OFFICE OF PERSONNEL MANAGEMENT, FAA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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QUESTION PRESENTED

WHETHER ALLOWING THE GOVERNMENT TO USE "SECRET SETTLEMENTS" TO MITIGATE THE PENALTY OF REMOVAL IMPOSED AGAINST SOME, BUT NOT ALL, EMPLOYEES FIRED FOR STRIKING AGAINST THE FEDERAL GOVERNMENT ABROGATES THE EQUAL TREATMENT GUARANTEES OF THE CIVIL SERVICE REFORM ACT AND THE UNITED STATES CONSTITUTION.

TABLE OF CONTENTS

Page

QUESTION PRESENTED.....1

OPINIONS BELOW.....2

JURISDICTION.....2

STATUTES AND REGULATIONS.....3

STATEMENT OF THE CASE.....4

REASONS FOR GRANTING THE WRIT.....9

I. FAILURE TO GRANT THE WRIT WILL RENDER THE EQUAL TREATMENT GUARANTEES OF THE CIVIL SERVICE REFORM ACT AND THE U. S. CONSTITUTION MEANINGLESS.....10

CONCLUSION.....31

APPENDIX.....33

TABLE OF AUTHORITIES

Pages

CASES

Bivens v. TVA
8 MSPR 458 (1981).....11,20,21

Bergh v. DOT,FAA,
794 F.2d 1575 (1986).....2,6,9,10,11

Douglas v. VA
5 MSPR 280 (1981).....11,12

Drummer V. GSA,
22 MSPR 432 (1984).....11,20

Filip v. VA,
15 MSPR 329 (1983).....11,20

Norwood v. FAA,
580 F. Supp. 984 (1983).....7,15,16,17

Phillips, Inc. v. Walling
324 U.S. 490 (1945).....14

Schapansky v. DOT, FAA
735 F.2d 477 (1984).....13

United States v. Dotterwich
320 U.S. 277 (1943).....24

Washington v. TVA
8 MSPR 27 (1981).....19, 21

Wilson v. U. S. Postal Service
21 MSPR 490 (1984).....11, 20

Wirtz v. Ti Ti Humus Company
373 F.2d 209 (4th Cir. 1976).....14

Woody v. GSA
6 MSPR 468 (1981).....10, 11

Yick Wo v. Hopkins
118 U.S. 356 (1886).....21, 22

STATUTES AND REGULATIONS

5 U.S.C. § 2301(b).....3, 18, 23, 24

5 U.S.C. § 7311.....4

5 U.S.C. § 7513(d).....8

5 U.S.C. § 7701.....8, 18, 23

5 U.S.C. § 7702.....26

5 U.S.C. § 7703(c).....3, 8

28 U.S.C. § 1254(1).....2

OTHER DOCUMENTS

Breaking Trust, Director's Monograph, U. S. Merit Systems Protection Board Office of Merit Systems Review and Studies, February 1982.....14, 15

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Federal Circuit is reprinted in the Appendix to this petition and is an unpublished decision of the Court. The opinions of the United States Merit Systems Protection Board are reprinted in the Appendix to this Petition. The Bergh v. Department of Transportation, FAA, decision on which the Court below based its decision in this case is also reprinted in the Appendix.

JURISDICTION

The opinion and judgment of the Court of Appeals was entered on July 18, 1986 and the jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

STATUTES AND REGULATIONS

5 U.S.C. Section 2301(b):

> Federal personnel management should be implemented consistent with the following merit system principles...
>
> (2) All employees and applicants for employment should receive fair and equitable treatment in all aspects of personnel management without regard to political affiliation, race, color, religion, national origin, sex, marital status, age, or handicapping condition, and with proper regard for their privacy and constitutional rights.
>
> (8) Employees should be
>
> (A) protected against arbitrary action, personal favoritism, or coercion for partisan political purposes...

5 U.S.C. Section 7703(c):

> In any case filed in the United States Court of Appeals for the Federal Circuit, the court shall review the record and hold unlawful and set aside any agency actions, findings, or conclusions found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;...

5 U.S.C. Section 7311:

> An individual may not accept or hold a position in the Government of the United States...if he ... (3) participates in a strike ... against the Government of the United States...

STATEMENT OF THE CASE

Petitioners, air traffic controllers employed by the U. S. Department of Transportation, Federal Aviation Administration, [hereinafter FAA], were fired for striking against the government in August 1981. Before the Merit Systems Protection Board and Court of Appeals for the Federal Circuit, Petitioners, among other arguments, alleged the removal for striking was in violation of the equal treatment guarantees found in the Merit System Principles of the Civil Service Reform Act and the Fifth Amendment Equal Protection Clause of the U.S. Constitution. The claimed

denial of equal treatment was based upon the Government's entering "secret settlements" which mitigated the penalty of removal imposed against some, but not all, of the employees who were fired for striking in August 1981. The Court of Appeals and Merit Systems Protection Board rejected Petitioner's contentions and denied Petitioner's request to reopen the record for additional discovery and admission of evidence regarding the settlements with similarly situated employees.

The only issue presented in this case which had not previously been decided by the Court of Appeals in other air traffic controller appeals was: Whether the record should be reopened for discovery and introduction of evidence which might prove the government violated

petitioner's constitutional and statutory rights to equal treatment for similar offenses when it entered into secret settlements with a number of controllers fired for striking and reduced their removal to a suspension without pay for being Absent Without Leave (AWOL). The Court of Appeals denied the appeal based upon its July 2, 1986 ruling in Bergh v. Department of Transportation, FAA, 794 F.2d 1575. (Appendix D). In Bergh the Court basically ruled that the requirements of the Civil Service Reform Act of 1978 guaranteeing equal treatment of employees do not apply to settlement agreements which reduce penalties previously imposed. The Court concluded that the law favors settlement of cases and overlooked the prior law requiring the government to prove by a preponderance of the

evidence that there were legitimate reasons for disparate treatment once an employee-appellant alleges disparate treatment in comparison with other employees.

The facts which first gave rise to Petitioner's claim of disparate treatment was counsel's discovery in November 1982 that a number of controllers who were fired and had appealed their firings to the MSPB had their appeals dismissed without explanation. Subsequently, a Freedom of Information Act lawsuit filed against the FAA in the United States District Court for the Western District of Tennessee, Civil Action No. 83-2315-HA, W.D. Tenn. (1983),(reported at 580 F.Supp. 984 (1983), resulted in a court order denying the government's claim of exemption of the settlements from the

FOIA. Subsequent production of 123 redacted files by the government verified that federal employees fired for striking had their removal reduced to a suspension without pay for being Absent Without Leave after they appealed their removal to the MSPB. Reasons for the lesser penalties being imposed against these strikers have not been disclosed by the government. The request to reopen the record and allow further discovery and introduction of evidence relating to these settlements was denied upon a ruling that the evidence was not relevant. The Court below reviewed the MSPB decision pursuant to 5 U.S.C. Section 7703. The MSPB review of Petitioner's appeal of the termination decision was pursuant to 5 U.S.C. Section 7513(d) and Section 7701.

REASONS FOR GRANTING WRIT

The Court of Appeals for the Federal Circuit decided a question of law which affects the rights of every federal government employee under the Civil Service Reform Act of 1978 and which has not, but should be, settled by this Court. The Court denied requests to reopen the record below for discovery concerning alleged "secret settlements" entered between the FAA and certain other air traffic who had, like Petitioners, been fired for striking in August, 1981. The Court denied the request based upon its opinion in Bergh v. Department of Transportation, FAA, wherein the Court ruled in effect that disparate treatment in discipline which results from settlement of cases before the Merit Systems Protection Board does

not violate the prohibitions against disparate treatment in discipline found in the Civil Service Reform Act and the United States Constitution.

I. FAILURE TO GRANT THE WRIT WILL RENDER THE EQUAL TREATMENT GUARANTEES OF THE CIVIL SERVICE REFORM ACT AND THE U. S. CONSTITUTION MEANINGLESS.

The decision of the U.S. Court of Appeals for the Federal Circuit in this case, relying on its decision two weeks earlier in Bergh v. Department of Transportation, FAA, 794 F.2d 1575 (July 2, 1986), has the effect of reversing the prior rule of law which required government agencies to prove by a preponderance of the evidence that there were legitimate reasons for disparate treatment of employees for similar alleged misconduct. Woody v.

General Services Administration, 6 MSPR 468, 488 (1981); Douglas v. Veterans Administration, 5 MSPR 280, 306-7 (1981); Bivens v. TVA, 8 MSPR 458, 463 (1981); Washington v. TVA, 8 MSPR 27, 29 (1981); Filip v. Veterans Administration, 15 MSPR 329, 333 (1983); Drummer v. GSA, 22 MSPR 432, 434 (1984); Wilson v. U.S. Postal Service, 21 MSPR 490 (1984).

The Court in Bergh concluded that

> Woody and Douglas, however, are inapposite because they deal solely with the question whether the penalty the agency selected was proper. The alleged disparate treatment here, however, does not involve any difference in the penalty imposed upon different employees -- all the air traffic controllers involved were removed -- but turns upon the propriety of the Administration's settling some of the cases before the Board by reinstating some controllers, and not explaining the reasons why it also did not enter into like settlements with the petitioners.

Appendix D. In addition, the Court concluded that the explanation of counsel for the agency in its brief to the Court of why it reduced the removal penalty for some controllers met the Government's burden and that settlements were to be encouraged. If these rulings of the Court of Appeals are allowed to stand, then the government in the future will be allowed to routinely make "end runs" around the equal treatment guarantees of the Civil Service Reform Act of 1978 and the equal protection guarantees of the U.S. Constitution. Obviously, to avoid the Woody and Douglas burden of proof when disparate treatment is alleged by an employee who has been disciplined, all the government will have to do is provide equal penalties initially and then enter secret settlement the next day

with the favored employee reducing or eliminating the penalty imposed.

The intent of the Congress and the President of the United States in the enactment of the landmark Civil Service Reform Act of 1978 was mainifestly clear: to remedy serious defects in the Nation's Civil Service System, especially continuing abuses of the "merit system" first set up by the Pendleton Act of 1883. As the Court of Appeals for the Federal Circuit stated in Schapansky v. Dept. of Transp., FAA, 735 F.2d 477, 485 (1984), "Ideal justice, and government personnel regulations, envisage equal treatment of persons similarly situated". To ensure that this ideal justice is attained the Civil Service Reform Act was amended in 1978 to correct some of its earlier weaknesses.

Remedial legislation regulating the conditions of employment (like the Civil Service Reform Act and the Fair Labor Standards Act) is to be liberally construed "in favor of the workers whom it was desigred to protect" with an eye toward carrying out the intent of Congress and the will of the people in passing enactments to remedy past abuses. Wirtz v. Ti Ti Humus Company, 373 F.2d 209 (4th Cir. 1976), citing Phillips, Inc. v. Walling, 324 U.S. 490, 493 (1945).

The recent MSPB BREAKING TRUST report concluded that the merit system principles and prohibited personnel practices, "Taken together ... constitute a sort of 'Magna Charta' or constitution of federal employment law. BREAKING TRUST, Prohibited Personnel Practices in the

Federal Service, Director's Monograph, U. S. Merit Systems Protection Board Office of Merit Systems Review and Studies, February 1982 at 1, hereafter cited as BREAKING TRUST. That "Magna Charta or constitution" has been violated through the secret settlements and now sanctioned by the Court's decision below.

While the U. S. Government gave the impression to the world that all striking air controllers who failed to return to work by their deadlines were permanently fired, that same Government gave favorable treatment and special consideration to at least 123 air traffic controllers by reintstating them after they went on strike, were fired for doing so, and had appealed their firings to the MSPB. Norwood v. FAA, 580 F. Supp. 984 (W.D. TN. 1983). For the 123 the

penalty of removal for striking was reduced to a suspension without pay for being Absent Without Leave and implemented through secret settlement agreements. Id.

The "secret settlements" were learned of by Petitioner's counsel for the first time in November 1982 when he became aware of the dismissal, without explanation, of several cases pending before the MSPB. Each of these cases involved air traffic controllers fired for striking in August 1981. They were fired only after having had an opportunity to respond to the charges of striking and having had those defenses rejected by the FAA. That the secret settlements were entered was later verified through a Freedom of Information Act lawsuit filed by counsel for Petitioner in the United States

District Court for the Western District of Tennessee. Norwood v. Federal Aviation Administration, 580 F. Supp. 994 (W.D.TN. 1983). The Honorable United States District Court Judge Odell Horton granted a motion for partial summary judgment for the Plaintiff in that case, rejecting all of the Government's claims that these settlements were exempt from disclosure under the Freedom of Information Act and ordering that the Government release the inculpatory documents based on there being a "strong public interest in ascertaining whether the agency authorized to deal with the Nation's aviation safety handled matters surrounding the strike in a fair and consistent manner." (emphasis added) Id.

Petitioner suggested below that

secret settlements in fedeal personnel management violate two of the merit principles, to wit:

> Federal personnel management should be implemented consistent with the following merit system principles:...
>
> (2) All employees and applicants for employment should receive **fair and equitable treatment in all aspects of personnel management** without regard to political affiliation, race, color, religion, national origin, sex, marital status, age, or handicapping condition, and **with proper regard for their privacy and constitutional rights**
>
> (8) Employees should be
>
> (A) **protected against arbitrary action, personal favoritism,** or coercion for partisam political purposes.

5 U.S.C. 2301. (Emphasis added) Under 5 U.S.C. § 7701(c)(2)(B), any agency personnel decision, even assuming arguendo it is supported by a preponderance of the evidence, must be reversed where the employee shows that

the decision was based on any prohibited personnel practice. Clearly, agencies act illegally, arbitrarily and capriciously when they dispense unequal penalties for equal offenses. In one case, a United States Tennessee Vally Authority employee was fired for possession of a firearm on TVA property -- while other TVA employees found with firearms were merely given warning letters. The Merit Systems Protection Board held in that case that where rules are inconsistently applied, agency decisions to remove employees will be overturned. Washington V. Tennessee Valley Authority, 8 MSPR 27, 29 (1981).

In another MSPB-TVA case involving illegal, arbitrary and capricious discrimination in the form of unlike penalties for like offenses, two employees were fired for removing

TVA equipment, for unauthorized use of TVA equipment, and for other offenses. Before the MSPB, the fired TVA employees produced unrebutted evidence that other similarly situated employees were given less severe penalties. The Merit Systems Protection Board ordered the less severe 60 day suspension be imposed instead of the unequal and discriminatory firing. Bivens and Marshall v. Tennessee Valley Authority, 8 MSPR 458 (1986). The Board continued to follow this rule in Filip v. VA, 15 MSPR 329, 333 (1983); Drummer v. GSA, 22 MSPR 432, 434 (1984); Wilson v. U.S. Postal Service, 21 MSPR 490 (1984).

Because the MSPB denied the request for discovery of and thereafter introduction of evidence of unequal treatment inherent in the 123 being

rehired through secret settlements, Petitioner was not afforded the same procedural rights and remedies as fellow U. S. Government employees (e.g. Washington, Bivens and Marshall). As a result Petitioner was denied a hearing on the unequal treatment by which they have been denied their rights under the Civil Service Reform Act and the Equal Protection provisions in the United States Constitution.

The federal courts are not strangers to similar cases of outrageous and invidious discrimination. For example, in the landmark Constitutional law case of Yick Wo v. Hopkins, 118 U.S. 356, 6 S. Ct. 1064 (1886), San Francisco required by ordinance that all hand laundries be in brick or stone buildngs (rather than in cheaper frame

buildings) unless there was special permission granted by the Board of Supervisors. Chinese immigrants were denied permission for a variance, were convicted of violation of the city ordinance, and were sentenced to imprisonment. The United States Supreme Court held the Equal Protection guarantees of the Constitution were violated by such discrimination.

In the case at hand, the Government avoided compliance with the Yick Wo rule by concealing the evidence that will prove denial of equal treatment under the law and the Court of Appeals for the Federal Circuit decision sanctions that concealment. The secrecy in the settlements implies that the reason some strikers were reinstated was because some have more influence than

others at FAA.

Under the Civil Service Reform Act, at 5 U.S.C. 7701(c)(2), no Merit Systems Protection Board decision may be upheld where the employee or applicant

> (A) shows harmful error in the application of the agency's procedures in arriving at such decision;
>
> (B) shows that the decision was based on any prohibited personnel practice described in section 2302(b) of this title; or
>
> (C) shows that the decision was not in accordance with law.

Petitioner contended below that (A) they have been victims of harmful error in exclusion of materially relevant evidence of unequal treatment, that (B) the personnel decisions affecting them were tainted with prohibited personnel practices [violations of 5 U.S.C. §§ 2301(b)(2)

and (b)(8)(a) inherent in the secret settlement] and that (C) the decision was not in accordance with the law and administrative decisions of the MSPB relating to unequal penalties for equal offenses.

The language of the statute requires only one of these three elements be present for a decision to be overturned. In this case, all three elements were present, providing the Court below with strong and compelling grounds for reopening the record in the interest of justice. If the Civil Service Reform Act is to be "treated as a working instrument of government and not merely as a collection of English words," United States v. Dotterwich, 320 U.S. 277, 280, 64 S.Ct. 134, 136 (1943), unequal treatment of Government employees who commit similar offenses must be

remedied. Only in a new hearing will Petitioner's rights be protected through the introduction into evidence of the 123 secret settlements and other evidence of unequal treatment. Allowing the ruling of the Merit Systems Protection Board and Court of Appeals to stand would encourage government law breaking through the new tool of "secret settlements" the day after "equal" penalties have been imposed.

Petitioners have been wronged, because information about possible illegality, irregularity and fraud in the settlement of the claims of a minority of air traffic controllers has been kept out of the consideration of Petitioner's case. Petitioners sought to have their cases remanded with an order to allow them an opportunity to enage in further

discovery about the secret settlements. The Civil Service Reform Act very specifically gives federal courts this power to right wrongs:

> The court shall review the record for the purpose of determining whether the findings are in accordance with law, and whether the procedures required by statute and regulations were followed ... the findings of the Board are conclusive if supported by evidence in the record. **If the court determines that further evidence is necessary, it shall remand the case to the Board.** The Board, after such further proceedings as may be required, may modify its findings, and shall file with the court the record of such proceedings. The findings of the board are conclusive if supported by the evidence in the record as supplemented.

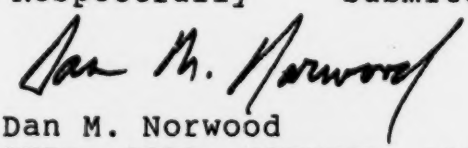
5 U.S.C. 7702. [Emphasis added] A remand on this crucial Civil Service Reform Act and constitutional law issue is indeed a very small price to

pay for assuring the honesty and integrity of the federal personnal system.

CONCLUSION

If we are to reach the "ideal justice" this Court referred to in Schapansky, Id. at 485, "secret settlements" of federal employee appeals of disciplinary actions must be prohibited and the decision below should be reviewed and reversed. For these reasons, Petitioners request the Court grant the writ of certiorari.

Respectfully submitted,



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October 1986

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition for Writ of Certiorari was sent by regular mail, postage prepaid, this 16th day of October, 1986.

Solicitor General
Department of Justice
Washington, D.C. 20530

Sandra Spooner
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2nd Floor, Todd Building
Washington, D.C. 20530

Dan M. Norwood

APPENDIX

TABLE OF CONTENTS

Page

A. Decision of the Court of Appeals for the Federal Circuit.....1

B. Decision of the Merit Systems Protection Board.....3

C. Decision of the Presiding Official of the Merit Systems Protection Board.....10

D. Bergh v. Dept. of Transportation, FAA decision.....36

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

JOHN PATRICK ALLEN, and ALEXANDRA GEORGEO,	*	
	*	Appeal No. 85-1123
Petitioners,	*	
v.	*	MSPB Docket Nos. ATO75281F2352 ATO75281F2396
DEPARTMENT OF TRANSPORTATION, FAA,	*	
Respondent.	*	

DECIDED: July 18, 1986

Before FRIEDMAN, Circuit Judge, BENNETT, Senior Circuit Judge, and BISSELL, Circuit Judge.

PER CURIAM.

DECISION

The decision of the Merit Systems Protection Board, affirming the petitioners' removal by the Federal Aviation Administration, Department of Transportation, are affirmed.

OPINION

Petitioners Allen and Georgeo bring this appeal asking the court to order the board to reopen the record below for discovery concerning certain alleged "secret settlements" entered into between the FAA and certain other air traffic controllers with situations allegedly similar to Allen and Georgeo. Assuming, without deciding, that this issue was preserved before the board and is now a proper subject in this appeal, the recent opinion of Bergh v. Department of Transportation, FAA, App. No. 85-1102 (Fed. Cir. July 2, 1986). decides this issue and prevents us from granting Allen and Georgeo the requested relief.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

JOHN PATRICK ALLEN, ET AL [1]

v. Docket No. ATO75281F2352

DEPARTMENT OF TRANSPORTATION.

OPINION AND ORDER

Appellants have petitioned for review of the initial decision dated January 14, 1983, sustaining their removal from the position of Air Traffic Control Specialist at the air traffic control facilities in Florida. The agency based the removal action on charges of participating in a strike against the United States Government in violation of 5 U.S.C. §7311 and 18 U.S.C. §1918, and unauthorized absence (AWOL).

Upon consideration of the appellants' petitiion, we find that the legal issues raised have been

addressed and resolved by the Board.[2] that the presiding official's findings as to those legal issues are essentially consistent with ours, and that any inconsistency in the presiding official's determinations on those issues would not affect the outcome of these appeals. In addition, to the extent that the arguments made in the appellants' petition relate to the presiding official's factual determintions, we find that the appellants' have not demonstrated any factual error by the presiding official, based on specific references to the record, sufficient to warrant the Board's full review of the record. See Weaver v. Department of the Navy, 2 MSPB 297, 299 (1980).

This is the final order of the Merit Systems Protection Board in these appeals. The initial decision

sustaining the appellants' removal shall become final five (5) days from the date of this order. 5 C.F.R. § 1201.113(b).

Each appellant is hereby notified of the right under 5 U.S.C. §7703 to seek judicial review of the Board's action by filing a petition for review in the United States Court of Appeals for the Federal Circuit, 717 Madison Place, N. W., Washington, D. C. 20439. The petition for judicial review must be received by the court no later than thirty (30) days after the appellant's receipt of this order.

FOR THE BOARD:

Nov. 9, 1983

Robert E. Taylor
Secretary

Washington, D.C.

Attachment: Statement of Board's policy on service of its opinions and orders.

APPENDIX

John Patrick Allen	ATO75281F2352
Frank J. Baran	ATO75281F2353
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Jay Calvin Bronson	ATO75281F2366
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John A. Carey, Jr.	ATO75281F2373
Christopher M. Corcoran	ATO75281F2376
Robert E. Dancho	ATO75281F2383
Alan Daniel Dippy	ATO75281F2385
[eter R. Donaldson	ATO75281F2386
William Allen Dowe	ATO75281F2388
Thomas L. Gammon	ATO75281F2394
Alexandra Georgeo	ATO75281F2396
David L. Gordon	ATO75281F0098
James Edward Guldi	ATO75281F2401
Joseph P.Harris	ATO75281F2404
Michael Dale Harris	ATO75281F2405
William Richard Hicks	ATO75281F2408
Curtis Horton	ATO75281F2411
Sam P. Huddleston, Jr.	ATO75281F2413
Harold E. Jacobs	ATO75281F2417
Charlie L. Johnson	ATO75281F2418
Terry Lee Jones	ATO75281F2419
Robert Keith	ATO75281F2421
Henry R. Kitchens	ATO75281F2423
Johns Charles Levings	ATO75281F2430
Michael Leroy Lovins	ATO75281F2433
Roderick D. Morris	ATO75281F2440
Michael J. Mueller	ATO75281F2441
Robert Nocito	ATO75281F2442
John Patrick O'Dea	ATO75281F2444
Oscar N. Olin	ATO75281F2447
Charles C. Runion, Jr.	ATO75281F2463
Jimmy Dee Rushing	ATO75281F2464
Bruce P. Sheekey	ATO75281F2467
Phillip A. Swain	ATO75281F2473
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Quincy T. Walls	ATO75281F2483
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Larry D. Yochem	ATO75281F2493
Nancy J. O'Donnell	ATO75281F2496
Richard P. Abrams	ATO75281F2498
Frank Earl Brankenwagen	ATO75281F0939
Jimmy Lee Brooks	ATO75281F0940
Robert J. Carr	ATO75281F2504
Dennis Blair Connors	ATO75281F2505
John F. Crow	ATO75281F2506
Douglas Lester Denney	ATO75281F2507
Jerry Wayne Medders	ATO75281F2517
Steven Wayne Nelson	ATO75281F0936
Leona Olivia Norman	ATO75281F2519
Kenneth V. Prescott	ATO75281F2522
Edgar Russell	ATO75281F2524
William F. Sweeney	ATO75281F2526
John C. Whiteley, Jr.	ATO75281F2729
Harold T. Wilson	ATO75281F2529
Orville Lacy Wright	ATO75281F2530

FOOTNOTES

1. An initial decision, applicable to the consolidated appeals of 94 air traffic controllers, was issued by the Board's Atlanta Regional Office under the caption of Agolini v. Department of Transportation, MSPB Docket No. ATO75281F2351 (January 14, 1983). A consolidated petition for review was filed on behalf of 63 of those appellants, but two subsequently withdrew. In addition, a separate opinion and order will be issued with regard to William T. Sedgwick.

Since appellant Agolini did not file a petition for review, the instant petition will therefore be adjudicated under the name of Allen v. Department of Transportation, MSPB Docket No. ATO75281F2352. The 60 appellants affected by this opinion are listed in the attached Appendix.

2. With regard to the legal issues, the appellants' petition for review and the briefs submitted in support thereof are identical to thos addressed and resolved by the Board in Bangerter v. Department of Transportation, MSPB Docket NO. SLO75281F0279 (September 27, 1983. See also McPartland v. Department of Transportation, MSPB Docket No. DAO75281F1018 at 5 (February 8, 1983) (cancellatioin of annual leave); Adams v. Department of Transportation, MSPB Docket No. NYO75281F0424 at 22 (April 25, 1983) (propriety of the decision to deny leave); Jackson v. Department of the Navy, 5 MSPB 456, 457 (1981) (discretion of agency to deny sick leave if not sufficiently documented);

Baracco v. Department of Transportation, MSPB Docket No. DC075281F0895 at 17-19 (harmful effects of procedural errors by agency).

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD
WASHINGTON REGIONAL OFFICE

GERALD L. AGOLINI, ET AL [1]

CASE NO. ATO75281F2351
v. DATE: January 14, 1983

DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION

INTRODUCTION

Appellants filed appeals from the agency's actions removing them from the position of Air Traffic Control Specialist.

JURISDICTION

The actions appealed were effected under subpart D of Part 752 of the Office of Personnel Management rgulations, which was promulgated pursuant to OPM's authority under 5 U.S.C. § 7514. The record reflects that appellants were covered employees as defined by subpart D, and were entitled to appeal these actions to the Board. See 5 U.S.C. §§7511(a)(1)(A), 7512, 7513(d); 5 C.F.R. §§752.401(a), 752.401(b)(1), 752.405(a). I therefore find that the appeals are properly before the Board for adjudication.

ANALYSIS AND FINDINGS

The agency proposed appellants' removals on the basis of two charges:

(1) participation in a strike against the United States Government in violation of 5 U.S.C. §7311 and 18 U.S.C. §1918; and (2) unauthorized absence. Both charges stem from appellants' failure to report for duty on various dates in August of 1981.

The Board has taken official notice of the fact that members of the Professional Air Traffic Controllers Organization (PATCO) engaged in an illegal strike against the Federal Government from August 3, 1981 through at least August 6, 1981. Ketchem v. Department of Transportation, MSPB Docket No. DA075281F0713 (5/28/82). In addition, the Board has found that an employee's unauthorized absence during the period of such a strike may constitute a prima facie case of said employee's participation therein. Schapansky v. Department of Transportation, MSPB Docket No. DA075281F1130 (10/28/82); Jones v.Tennessee Valley Authority, MSPB Docket No. AT07528010300 (2/19/82); Ducket and Yardley v. Tennessee Valley Authority, MSPB Docket No. AT07528010325 (2/19/82).

Striking has been defined as the "actual refusal in concert with others to provide services to one's employer." United Federation of Postal Clerks v. Blount, 325 F. Supp. 879 (D.D.C.), affirmed, 404 U.S. 802 (1971). In Ketchem, supra at page 9, the Board stated that where an employee is charged with participation in the PATCO strike "on dates subsequent to August 6, 1981, the agency bears the burden of proving by direct evidence that a strike was in

fact in progress on the date charged, and that the employee could have returned to work on that date." In this regard, there is no dispute that an employee who failed to report for his or her "deadline shift" (the first regularly scheduled shift after 11:00 a.m. on August 5, 1981), would not have been returned to an active duty status if he or she attempted to return after his or her deadline had passed. While picketing and other "strike activity" continued for several weeks, or even months, after August 6, 1981, the agency effectively ended any particular employee's participation in the strike after the employee had missed the "deadline shift", and no longer had an opportunity to "provide services", per se. My findings below with respect to the striking charge will therefore be limited to each appellant's duty days from August 3, 1981 through the date of his or her "deadline shift". This same rationale, however, is inapplicable to the charge of unauthorized absence. Notwithstanding the fact than an employee would not have been placed in an active duty status if he or she attempted to return to work after his or her deadline had passed, such an employee could have been entitled to be placed in a non-duty status, with pay. At a minumum , any absences on and after the date that the agency rebuffed his or her offer to return to work would be "authorized", regardless of the pay or leave status recorded by the agency. However, unless the employee appeared for duty, or otherwise communicated to the agency a desire to return to work, I find that the agency

could validly charge the employee with unauthorized absence on previously scheduled duty days subsequent to his or her deadline.

The agency presented the testimony of the Chief or Deputy Chief of each of the three facilities involved, and/or documentary evidence (watch schedules, sign-on logs, memoranda and/or time and attendance records) to establish that each of the appellants was absent without authorization on one or more of her "deadline shift". I find this evidence to be sufficient to establish a prima facie case of strike participation with respect to each of the appellants. In light of this finding, the burden of persuasion now shifts to each appellant to show that he or she "had no knowledge of the existence of the strike or to demonstrate that his [or her] absence was due to some factor other than intentional participation in the strike." Schapansky , supra, at 6. In this regard, several of the appellants did allege specific reasons for their absences. Each will be addressed below.

William Sedgwick became a member of PATCO's national negotiating team in June of 1980 and, prior to August of 1981, he made several trips to Washington, D.C. in connection with contract negotiations. On each of these occasions, he received prior approval from his Chief John Atkinson, who authorized the issuance of a Government Travel Request (GTR) for appellant's airline tickets and, if time allowed, the issuance of a travel advance. Appellant claims that he went to Washington, D. C. on August

2, 1981 based upon a July 30 or 31, 1981 communication from Robert Poli, President of PATCO National. He testified that he did not request Mr. Atkinson's approval of the trip because Mr. Poli had told him to keep it a "secret", and because Mr. Atkinson had once told him that he need not get his approval in advance if he got a "last minute" call. He also testified that he believed himself to be on admininistrative leave on and after August 3, 1981.

I find Mr. Sedgwick's explanation of his absences to be incredible for several reasons. There was no "last minute" notice of the trip. Appellant knew of the trip 2-3 days prior to his departure, yet did not request Mr. Atkinson's approval. Nor did he subsequently contact Mr. Atkinson to obtain approval as he was supposed to under his own "last minute" scenario. In addition, the agency submitted an affidavit from the Director of FAA's Office of Labor Relations who stated that PATCO had not requested nor had his office approved, the attendance of Mr. Sedgwick at any negotiating sessions after June of 1981. (Agency Ex. 4). On cross examination, appellant admitted that he attended no negotiating sessions in August of 1981, but rather was waiting to review any proposed contract. Had the trip been authorized, there would have been no reason to keep it a "secret". I therefore find that appellant's trip and his absences on and after August 3, 1981, were unauthorized, and that appellant was so aware. I further find that his absences were not the result of any belief on his part that

he was on administrative leave. Harold Jacobs called his facility on August 5, 1981 and was informed that his previously approved annual leave was cancelled and that he was to report for his next scheduled shift at 8:00 a.m. on August 7, 1981. Appellant testified that he arrived home at approximately 1:00 a.m. following a lengthy drive from Pennsylvania. He stated that he felt that he would be too tired to work at 8:00 a.m., and that he attempted to call his facility, but the line was busy. He then called a member of his carpool who told him that he should come down to the union hall to find out what had been going on over the past several days. Appellant testified that he went to the union hall at approximately 3:00 a.m., and heard that some controllers had been told that they were already fired. He claims that he therefore believed that he had also been fired, and proceeded to return home and go to bed.

Mr. Jacobs' stated reason for not reporting for work on and after August 7, 1981 could be termed ridiculous, but it is, at best, incredible. He admits that he had been told that he could, and should, report for duty on August 7, 1981. Yet he allegedly relied upon hearsay and rumors regarding other controllers' situations in deciding not to report for duty on August 7, 1981 or any date thereafter, or even contact the facility again. No reasonable person, particularly one such as appellant with over 25 years of service, would effectively abandon his employment on the basis of such information. I

therefore find that appellant's absences on and after August 7, 1981 were not the result of any belief that he had been fired prior to that date.

James Rushing was on sick leave on July 31 and August 1, 1981, and had a regular day off on August 2, 1981. He claims that he continued to be ill, and believed himself to still be on approved sick leave until he allegedly attempted to return to work on August 6, 1981. However, appellant's team supervisor testified, and a call record in the file reflects, that he informed appellant on August 1, 1981 that in the event of a strike on August 3, 1981, all leave would be cancelled and that appellant was required to either call in or report for duty. Appellant did neither. Moreover, appellant did not mention his claim of continued illness and entitlement to sick leave in either his reply to the proposal notice or in his appeal to the Board. I therefore find that appellant did not in fact believe himself to be on approved sick leave at any time after August 2, 1981.

As noted above, Mr. Rushing claimed that he attempted to return to work on August 6, 1981. Mr. David Boyce makes the same claim. Both testified that they were turned away by a guard, and thereby, prevented from reporting for their "deadline shifts". At the outset, I note that neither one of them bothered to include any information regarding these alleged incidents in either their replies to the proposal notices or in their petitions for appeal to the Board.

Both admit that they did not identify themselves to the guard, who was not an employee of the agency, and neither one bothered to call the facility after he was allegedly turned away. In addition, Mr. Reisterer, an agency employee who was involved in security at the facility, testified that the contract guards on the gate were not authorized to turn anyone away. He testifed that the guards had a list of those persons who had already missed their deadlines, and that if any of those persons wanted to enter, the guards were to contact agency security personnel. If either appellant had, in fact, attempted to report prior to his deadline, he would have been allowed to enter. In light of the foregoing, particularly the inordinate amount of time which passed before either appellant raised this claim, I find that neither's absence on and after August 6, 1981 was the result of an inability to enter the facility.

Five of the appellants (Buesser, Gammon, J. Harris, O'Dea and Spinks) claim that they were on previously-approved leave on some of the dates covered by their proposal notices. However, three of them (J. Harris, O'Dea and Spinks) were informed prior to August 3, 1981 that in the event of a strike, all leave would be cancelled. (Agency Files, Tabs 13). The agency's attempts to communicate this same information to appellants Buesser and Gammon was apparently unsuccessful. However, both of them were clearly due to return to duty on August 9, 1981, the day before the issuance of their proposal notices. None of these

appellants testified at the hearing before me, nor otherwise presented evidence regarding the reasons for their absences from duty. I therefore find that each of them was absent without authorization during the strike.

With respect to those appellants whose leave was cancelled by the agency, their representative contends that such cancellations were not permitted under the agency's negotiated agreement with PATCO. (Appellants' Ex. FF) I note that section 5 of Article 28 of the Agreement does state that approval of leave "shall not be subject to conditional curcumstances." However, section 1 of the same Article provides that leave may be cancelled in the event of an "operational emergency". Moreover, the agency points out that Article 41 of the Agreement provides that the agency retains all rights preserved under 5 U.S.C. a7106, which provides, in part, that an agency may "take whatever actions may be necessary to carry out the agency mission during emergencies." I can think of few other situations which would better qualify as an emergency than the mass absence of the majority of an agency's work force. I therefore find that the agency could, and did, validly cancel previously-approved leave.

As to all appellants who were formerly employed at the Jacksonville Air Route Traffic Control Center (Hilliard), their representative argued that the time and attendance record in each appellant's file was potentially inaccurate; that the watch schedules

were not needed to verify their accuracy; and that the agency had not included them in its adverse action files. In this regard, the Center Chief testified that he did not rely on the watch schedules during his decision-making process. However, during the hearing, the agency did produce the appropriate watch schedule for each of the 65 appellants in question, and their representative had an opportunity review them. He subsequently submitted the watch schedules of four of the appellants (Buesser, Gammon, J. Harris and Jacobs), and I did consider them in reaching my findings above. In light of the fact that the representative did not submit the remaining 61 watch schedules, I presume that he felt that they contained no exculpatory information.

I find that the agency has established a prima facie case of strike participation with respect to all of the appellants, and that none of them has presented persuasive evidence in rebuttal. The same evidence establishes that appellants were absent without authorization, as alleged. I therefore find that the charges as set forth in the proposal notices are supported by a preponderance of the evidence, and are sustained.

Appellants raise several procedural arguments. In this regard, they bear the burden of proving error by the agency in the application of its procedures, and that said error was harmful. 5 U.S.C. §7701(c)(2)(A); 5 C.F.R. §1201.56(b)(1). They must show

that in the absence or cure of such error, the agency might have reached a different conclusion. 5 C.F.R. §1201.56(c)(3); Parker v. Defense Logistics Agency, 1 MSPB 489 (1980).

Appellants contend that they received insufficient notice of the agency's actions. In this regard, 5 U.S.C. §7513(b)(1) provides that an employee is entitled to "at least 30 days' advance written notice, unless there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed, stating the specific reasons for the proposed action." In these cases, the agency did have reason to believe that appellants had violated 18 U.S.C. §1918, a statute authorizing imprisonment for up to one year and a day. I therefore find that the agency was warranted in shortening the notice periods in the instant cases, and that no procedural error was involved, as alleged. Schapansky, supra at 8.

Numerous appellants claim that they received less than seven days in which to present their oral replies, and that this constituted reversible error on the part of the agency. 5 U.S.C. §7513(b)(2) provides that an employee is entitled to "a reasonable time, but not less than 7 days" to reply orally and in writing. In Ratley v. Department of the Army, MSPB Docket NO. ATO7528110338 (9/17/82), the Board stated than an action "taken without complying with the procedural requirements of 5 U.S.C. §7513(b)(2) clearly constitutes harmful error under 5 U.S.C. §7701(c)(2)(A)." In

that case, the employee was given only one day to reply to a proposed suspension notice. However, in the instant cases, each of the proposal notices stated that the employee was entitled to seven days in which to reply. Thus, there was no initial "denial" of a seven-day reply period as there was in Ratley. Each appellant raising this issue claims that the reply period was effectively shortened when the agency scheduled his or her oral reply on a date which was less than seven days after receipt of the proposal notice. The fact situations in these cases are substantially similar to the facts in the case of Johnson v. Department of the Treasury, MSPB Docket No. DC075209213 (8/27/82) where the agency issued its decision on a proposed suspension six days after the employee received the proposal notice. In its decision, the Board stated that the doctrine or harmful error was applicable to such a situation, and that the appellant in that case had not demonstrated any prejudice to her ability to respond to the charges, nor shown that the effective shortening of the reply period "likely had a harmful effect upon the outcome before the agency." Id. at 4.

Of the 42 appellants who initially raised this issue, at least 19 of them (Agolini, Blackwell, Boyce, Crow, Donaldson, Farris, Gilbert, Hodges, Jacobs, Johnson, Kitchens, Lovins, Manges, Norman, N. O'Donnell, Prescott, Sweeney, Wilson and O. Wright), each received a copy of his or her proposal notice at least seven days prior to the date scheduled for

his or her oral reply, as evidenced by postal receipts in the agency files, and/or statements made in appellants' petitions for appeal. I therefore dismiss the allegation with respect to these appellants. Not one of the other 23 appellants in question has attempted to show that his oral reply would have been any different if he had been afforded additional time. Moreover, I note that the "script" of the oral reply was substantially the same in each case, regardless of the number of days between receipt of the proposal notice and the oral reply. I therefore find that even absent any "shortening" of the reply periods, it is unlikely that the agency would have reached a different conclusion with respect to any of the appellants in question, and that any error by the agency in this regard was harmless. Johnson, supra; Messersmith v. General Services Administration, MSPB Docket NO. DCO7528010253 (12/2/81).

25 of the appellants claim that they "were denied the right to have a representative at their oral reply." In this regard, teach of these appellants submitted a written reply, and that he or she had been scheduled for the oral reply, and that he or she had been unable to remain at the agency past a certain time due to "personal reasons". Each written reply also stated that the appellant immediately requested a rescheduling of his or her oral reply, and that said request was denied. However, a written reply is hearsay, and does not constitute evidence of the matters stated therein in cases where there is an evidentiary hearing, and the party

has an opportunity to testify. Pelham v. Department of the Treasury, MSPB Docket No. DA075209140 (12/4/81). All of these appellants had such an opportunity, but only one, Mr. Rushing, presented any testimony at the hearing. With respect to this issue, Mr. Rushing testified that at approximately 4:30 p.m. on the date scheduled for his oral reply, he was told by appellant Eugene O'Donnell that the PATCO representatives could not stay any longer. On cross examination, he admitted that he made no request for a rescheduling of his oral reply, and, in fact, had no contact with any agency officials on that day. He stated that he was told that this representative made an oral request for rescheduling, but that he was not present when this request was allegedly made. He also stated that he was informed the following day by one of the PATCO representatives that there would be no oral reply in his case.

Mr. Rushing's testimony is at variance with the statements made in his written reply that he immediately requested a rescheduling of his oral reply and that the agency denied said request. Moreover, he has submitted no direct evidence of any statements or actions by agency officials on the scheduled date of his oral reply, or thereafter, which would show that the agency denied him an opportunity to submit an oral reply. I therefore find that none of the appellants in question, including Mr. Rushing, has shown any error by the agency, as alleged. However, even assuming that the agency did deny any requests for

rescheduling, and that said denials were not warranted under the circumstances, appellants have not shown that their oral replies, if made, would have been any different than the replies made by other appellants hving PATCO representatives, at which the employees stood "mute" with respect to charges. In such an instance, it is unlikely that the agency would have reached a different conclusion with respect to any of these appellants. I therefore find that even if the agency erred, as alleged, such error was harmless. Messersmith, supra.

All of the appellants allege that the agency committed harmful procedural error in that they were denied a meaningful opportunity to make oral and written replies. They claim that the deciding officials were "stripped of the power to mitigate the penalty" by virtue of President Reagan's statement that any air traffic controllers who did not report for duty within the grace period "have forfeited their jobs and will be terminated." See Air Traffic Controllers Strike, 17 Weekly Comp. Pres. Doc. 845 (Aug. 3, 1981). There is no dispute that once a deciding official determined that any given employee had participated in the strike and had not returned during the grace period, the only penalty which he could impose was removal. In this regard, the questions of mitigation and propriety of the penalty in these cases will be addressed below. However, with respect to the allegation of procedural error, the absence of authority to mitigate, as

in a case involving a statutorily mandated penalty for a given offense, in no way diminishes the right to reply to charges set forth in a proposal notice. Woody v. General Services Administration, MSPB Docket No. SF07528110028 (6/2/81). The deciding officials in these cases had both the authority and the responsibility to determine whether each of the appellants had engaged in the conduct set forth in the charges. (GENOT 141, Appellants Ex. D). I find that each of the appellants had the opportunity to provide meaningful input into those determinations, had he or she so desired. I therefore find no error, as alleged.

Appellants also claim that they were subjected to de facto suspension during the notice periods of the removal actions. In this regard, they claim that they were "locked out" by the agency, and that the agency was therefore unwarranted in continuing to carry them as AWOL on those previously scheduled duty days during the notice periods. Specifically, they contend that the agency's actions constituted suspensions of more than 14 days, which are appealable to the Board under the same statutory and regulatory provisions as the removal actions, and that the agency failed to afford them any procedural rights in connection therewith. As with any allegedly appealable action, the appellants have the burden of proof with respect to the Board's jurisdiction. 5 C.F.R. §1201.56(a)(2).

Under the agency's own regulations (Chapter 2, Paragraph 206, Section a(5) of FAA Order No. 3770.2B - Appellants' Exhibit AA) an employee is normally entitled to be retained in an active duty status during the notice period of an adverse action. This presumes that the employee is ready and willing to work. The institution of adverse action proceedings does not suspend the agency's authority to administer its leave policies, including the charging of AWOL for unauthorized absences on previously scheduled duty days. In the instant cases, appellants were not "locked out", as that term is used in the private sector. The agency did not suspend its operations, but rather continued to perform its mission despite the drastic reduction in available manpower. Moreover, appellants knew that they were still employees of the agency during this time, particularly in light of the "proposed" nature of the notices which they received. None of these appellants reported for duty or otherwise communicated wo the agency a willingness to return to work during the notice period. Had they done so, and if the agency had subsequently placed them, "for disciplinary reasons, in a temporary status without duties and pay", I could find that the agency had effected suspensions as defined by 5 U.S.C. §7501(2). However, the AWOL charges in question appear to have been nothing more than the logical consequences of appellants' continued unauthorized absences, and such charges, in and of themselves, are not appealable to the Board. Barger v. Department of

Justice, MSPB Docket No. SE075209019 (4/21/82); Marks v. Department of the Air Force, 3 MSPB 17 (1980). I therefore find that appellants have failed to meet their burden of proof with respect to the Board's jurisdiction.

Notwithstanding my findings with respect to the Board's jurisdiction, I find appellants' "appeals" of the alleged suspension actions to be untimely. 5 C.F.R. §1201.22(b) requires that a petition for appeal be filed within 20 days after the effective date of the action being appealed. Appellants did not "identify" the alleged suspensions until after the regulatory time limit for appeal had expired. Appellants claim that their untimely "identification" is permissible under 5 C.F.R. §1201.24(a)(9) which states, in part, that "[f]ailure to raise a claim or defense in the petition shall not bar its submission later unless to do so would prejudice the rights of the other parties and unduly delay the proceedings." However, appellants' removals were not based upon any absences subsequent to the issuance of the proposal notices, and the AWOL charges in question do not constitute a "claim or defense". They are, as appellants state, alleged suspensions. As such, they are subject to the same filing requirements as any other allegedly appealable actions, including the regulatory time limit for appeal. I therefore find that appellants' "appeals" of the alleged suspension actions were untimely filed, and that the record reflects no basis upon

which to waive the time limit for appeal pursuant to 5 C.F.R. §1201.12.

Appellants claim that they were subjected to disparate treatment in that some employees who were striking during the period of August 3-5, 1981 were allowed to return to work by reporting at or before the time of their "deadline shift". However, the agency made no determination as to whether an employee had been striking August 3, 4 or 5, 1981 if he or she reported during the grace period. (Appellants Ex. M, P 49, Agency's Answer to National Interrogatory No. 21). Absent such a determination by the agency or some other competent authority, appellants' claim is based upon the presumption of a fact not in evidence. Moreover, as in any case involving a claim of disparate treatment with respect to the imposition of discipline, appellants must show that the alleged disparity involved similarly situated employees. Kuhlmann v. Department of Health and Human Services, MSPB Docket NO. SLO7528010027 (2/23/82). In this regard, appellants' own allegation sets forth a dissimilarity of situations with respect to one fact that is in evidence, i.e., appellants did not return. I therefore find no disparity, as alleged.

Unauthorized absence, by its very nature, disrupts the efficiency of the service. Chiaverini V. United States, 157 Ct. Cl. 371 (1962); Desiderio v. Department of the Navy, 4 MSPB 171 (1980). As cited by the agency, strike participation by a Federal employee is violative of both civil

and criminal statutes. 5 U.S.C. §7311(3) provides that an individual may not hold a position in the Federal Government if he participates in a strike. This has been held to establilsh removal as the mandatory penalty for strike participation. American Postal Workers Union v. United States Postal Service, 628 F. 2d 1280 (9th Cir. 1982). In Schapansky, supra, the Board did not answer the question as to whether it had authority to mitigate what appears to be a statutorily mandated penalty. Rather, the Board found that in light of the nature and gravity of the offense of striking, as well as the direct, deleterious effects such conduct has on the efficiency of the service, mitigation of the penalty would not be warranted under the standards set forth in Douglas v. Veterans Administration, MSPB Docket No. ATO75299006 (4/10/81). I therefore find that the agency's penalty selections in these cases were both reasonable and appropriate.

In summary, I find that the agency effected appellants' removals for such cause as will promote the efficiency of the service, 5 U.S.C. §7513(a).

DECISION

The agency's actions are hereby affirmed.

NOTICE

This is an initial decision and will become a final decision of the Merit Systems Protection Board on Feb. 18, 1983 unless a petition for review is filed with the Board.

Any petition for review must be filed with the Board within thirty-five (35) calendar days after the issuance of this decision.

Any party to this appeal, the Director of the Office of Personnel Management (OPM) and the Special Counsel may file a petition for review of this decision with the Merit Systems Protection Board. The Director may request review only if he or she is of the opinion that the decision is erroneous and will have a substantial impact on any civil service law, rule or regulation under the jurisdiction of OPM. 5 U.S.C. §7701(e)(2). The petition must specifically identify the exception taken to this decision, cite the basis for exception, and refer to applicable law, rule or regulation.

The Petition for review must be filed with the Office of the Secretary, Merit Systems Protection Board, Washington, D. C., 20419 no later than thirty-five (35) calendar days after issuance of this decision. If a petition for review is filed, an informational copy of it should be forwarded to this office.

The Board may grant a petition for review when a party submits written argument and supporting documentation which tends to show that:

(1) New and material evidence is available that despite due diligence was not available when the record was closed; or

(2) The decision of the presiding official is based upon an erroneous interpretation of statute or regulation.

Under 5 U.S.C. §7703(b)(1)* an appellant has the right to seek judicial review of the Board's final decision in this appeal. A petition requesting such review must be filed with the United States Court of Appeals for the Federal Circuit no later than 30 days after appellant's receipt of the Board's final order or decision.

For the Board:

Joseph E. Clancy
Presiding Official

* As modified by § 127 of the Federal Court Improvement Act of 1982, to be codified at 28 U.S.C. §1295(a)(9).

APPENDIX

HILLARD, FLORIDA,

NAME	CASE NO.
Agolini, Gerald L.	ATO75281F2351
Allen, John P.	ATO75281F2352
Baran, Frank J.	ATO75281F2353
Batick, Kenneth R.	ATO75281F2356
Blackwell, Gerald V.	ATO75281F2359
Boyce, David E., Jr.	ATO75281F2362
Bright, Joseph W.	ATO75281F2364
Bronson, Jay C.	ATO75281F2366
Buesser, George R.	ATO75281F2370
Campbell, Joseph C.	ATO75281F2372
Carey, John A., Jr.	ATO75281F2373
Catron, James B.	ATO75281F2374
Corcoran, Christopher M.	ATO75281F2376
Cruess, Frederick W.	ATO75281F2380
Dancho. Robert E.	ATO75281F2383
Diedrick, Marvin J.	ATO75281F2384
Dippy, Alan D.	ATO75281F2385
Donaldson, Peter R.	ATO75281F2386
Dowe, William A.	ATO75281F2388
Gammon, Thomas L.	ATO75281F2394
Georgeo, Alexandra J.	ATO75281F2396
Gilbert, Warner H.	ATO75281F2397
Gordon, David L.	ATO75281F0098
Griffin, Gordon E.	ATO75281F2400
Guldi, James E.	ATO75281F2401
Harris, Joseph P.	ATO75281F2404
Harris, Michael D.	ATO75281F2405
Harris, William C.	ATO75281F2406
Hicks, William R.	ATO75281F2408
Hodges, Louis D.	ATO75281F2409
Horton, O. Curtis	ATO75281F2411
Huddleston, Sam F., Jr.	ATO75281F2413
Jacobs, Harold E.	ATO75281F2417
Johnson, Charlie L.,Jr.	ATO75281F2418
Jones, Terry Lee	ATO75281F2419
Keith, Robert	ATO75281F2421
Kitechens, Henry R.	ATO75281F2423
Levings, John C.	ATO75281F2430

Lopez, Anthony F.	ATO75281F2432
Lovins, Michael L.	ATO75281F2433
Millonzi, Lance M.	ATO75281F0922
Morris, Roderick D.	ATO75281F2440
Meuller, Michael J.	ATO75281F2441
Nocito, Robert	ATO75281F2442
O'Dea, John P.	ATO75281F2444
O'Donnell, Eugene P.	ATO75281F2445
O'Keefe, Timothy M.	ATO75281F2446
Olin, Oscar N.	ATO75281F2447
Paulsen, Wayne P.	ATO75281F2449
Reaser, James P.	ATO75281F2454
Rice, Ronald L.	ATO75281F2457
Runion, Charles, C.	ATO75281F2463
Rushing, Jimmy D.	ATO75281F2464
Sheekey, Bruce P.	ATO75281F2467
Spinks, Benjamin H.	ATO75281F2470
Swain, Phillip A.	ATO75281F2473
Tomlin, Gloria J.	ATO75281F2479
Von Dane, James A.	ATO75281F2480
Wall, Gary T.	ATO75281F2482
Walls, Quincey T.	ATO75281F2483
Wheeler, James W.	ATO75281F0046
Wiggins, William N.	ATO75281F2489
Woodham, Sanford G.	ATO75281F2490
Wright, Richard A.	ATO75281F2491
Yochem, Larry D.	ATO75281F2493

JACKSONVILLE, FLORIDA, ATCT

Abrams, Richard P.	ATO75281F2498
Brakenwagen, Frank E.	ATO75281F0939
Britton, Harry A.	ATO75281F2502
Brooks, Jimmy L.	ATO75281F0940
Burchett, Rodney N.	ATO75281F2503
Carr, Robert J.	ATO75281F2504
Connors, Dennis B.	ATO75281F2505
Crow, John F.	ATO75281F2506
Denney, Douglass L.	ATO75281F2507
Eason, Dennis J.	ATO75281F2509
Farris, Frederick H.	ATO75281F2509
Hetherington, W. R. Jr.	ATO75281F2513
Hogan, John T.	ATO75281F2514
Lane, Hale A., Jr.	ATO75281F2515

Manges, James R.	ATO75281F0935
Medders, Jerry W.	ATO75281F2517
Nelson, Steven W.	ATO75281F0936
Norman, Leona O.	ATO75281F2519
Prescott, Kenneth V.	ATO75281F2522
Rast, Robert E.	ATO75281F2523
Russell, Edgar R.	ATO752812524
Sweeney, William F.	ATO75281F2526
Thomas, Arthur H., Jr.	ATO75281F2728
Whiteley, John C., Jr.	ATO75281F2729
Wilson, Harold	ATO75281F2529
Wright, Orville L.	ATO75281F2530

JACKSONVILLE (CRAIG), FLORDIA, ATCT

Manning, John A., Jr.	ATO75281F2495
O'Donnell, Nancy J.	ATO75281F2496
Sedgwick, William T.	ATO75281F2497

* Represented by David R. Siegel

FOOTNOTES

1 This decision encompasses the appeals of 94 former air traffic controllers, 91 of whom are represented by the firm of Leighton, Conklin, Lemov, Jacobs & Buckley. The remaining three appellants are represented by Mr. David E. Siegel. Appellants' names and case numbers appear in the attached appendix.

No.

**IN THE SUPREME COURT
OF THE UNITED STATES
OCTOBER TERM, 1986**

P. M. BERGH, et al	*	Appeal No.
	*	85-1102
MILTON C.	*	Appeal No.
CROISSANT, et al	*	85-1103
LARRY L. JOHNSON,	*	Appeal No.
et al,	*	85-1106
JOHN C.HOLEN,	*	Appeal No.
et al	*	85-1108
MYRON L. THOMSON,	*	Appeal No.
et al	*	85-1240
JOHN W.KARR, et al,	*	Appeal No.
	*	85-1241
STUART F. ETTER,	*	Appeal No.
et al,	*	85-1242
MELVIN L.BEEBE,	*	Appeal No.
et al,	*	85-1243
WILLIAM C.	*	Appeal No.
JOHNSON, et al,	*	85-1245
	*	
v.	*	
	*	
DEPARTMENT OF	*	
TRANSPORTATION,FAA	*	
	*	
Respondent.	*	

DECIDED: July 2, 1986

Before FRIEDMAN, SMITH, and BISSELL, Circuit Judges, FRIEDMAN, Circuit Judge.

In this petition for review, former air traffic controllers challenge the decisions of the Merit Systems Protection Board (Board) upholding their removal by the Federal Aviation Administration (Administration) for participating in the illegal 1981 strike on various grounds. A major contention is that the Administration acted improperly by reinstating other controllers whom it also had removed for striking but not reinstating the petitioners. We reject the petitioners' challenges to the decisions of the Board and affirm them.

I.

Counsel for the petitioners requested oral arguments. We determined, however, that all but one of the issues the petitioners raised

have been authoritatively decided in our previous decisions, that the facts and legal arguments were adequately presented in the briefs and record, and that the decisional process woudl not have been aided by oral argument. Fed. R. App. P. 34(a). We heard oral argument on the issue whether the Administration acted improperly in reinstating some, but not all, of the fired controllers.

II.

A. the parties stipulated that "[t]he FAA nationwide has reinstated some air traffic controllers/appellants who were removed for participation in the [air traffic controllers] strike pursuant to settlement agreement." The petitioners argue that the agency "violated MSPB principles and fundamental fairness by reinstating

some controllers found guilty of striking, for no reason which can be discerned from the record." They cite Douglas v. Veterans Administration, 5 MSPR 280 (1981), and Woody v. General Services Administration, 6 MSPR 488 (1981), for the proposition that "where an appellant raises an allegation of disparate treatment in comparison to specified employees, the agency must prove a legitimate reason for the difference in treatment by a preponderance of the evidence before the penalty can be upheld." Woody, 6 MSPR at 488 (citing Douglas, 5 MSPR at 306-07). The Petitioners assert that the agency "has provided no explanation, much less any evidence, as to why it vacated its findings and dismissed its charges against the reinstated controllers while denying petitioners this benefit."

Woody and Douglas, however, are inapposite because they deal solely with the question whether the penalty the agency selected was proper. The alleged disparate treatment here, however, does not involve any difference in the penalty imposed upon different employees -- all the air traffic controllers involved were removed -- but turns upon the propriety of the Administration's settling some of the cases before the Board by reinstating some controllers, and not explaining the reasons why it also did not enter into like settlements with the petitioners.

The agency has given the following explanation in its brief of the process by which, and the reasons why, it determiined to settle some of the cases but not those of the petitioners:

> The FAA conducted an in-depth analysis of each of the 11,000 cases of the removed air traffic controllers in preparation for the litigation before the MSPB. As part of the litigation strategy, the FAA undertook an analysis of the strengths and weaknesses of each case. Based on this individualized analysis, the agency made decisions to enter into settlement negotiations with certain air traffic controllers whose appeals were pending. As part of this analysis, the FAA also reviewed the individual cases of the petitioners and made individual determinations that settlement was not warranted in these cases. The agency embarked on the litigation analysis in order to best prepare its cases for hearings, not under any policy to settle cases. The cases selected for settlement were those whose examination demonstrated to the FAA that further litigation would not be successful.

We know of no principle that precludes the government from settling, upon whatever terms it deems suitable, cases in which it determines

that the likelihood of success is so low as to make continued litigation inappropriate. The decision whether to settle a particular case and upon what terms is a matter particularly within the discretion of the agency conducting the litigation. The agency was not required to give detailed reasons in each particular case concerning the facts that led it to settle rather than to litigate, as the petitioners apparently would require it to do. The agency's statement that based upon "an analysis of the strengths and weaknesses of each case", it decided not to conduct "further litigation" of those cases where the analysis indicated that such litigation "would not be successful", was a sufficient explanation for the settlements the government made.

The law favors settlement of

cases. United States v. Contra Costs County Water District, 678 F. 2d 90, 92 (9th Cir. 1982); Stotts v. Memphis Fire Department, 679 F. 2d 541, 565 (6th Cir. 1982); Airline Stewards & Stewardesses Association, Local 550, TWU, AFL-CIO v. American Airlines, 573 F.2d 960, 963 (7th Cir. 1978); Florida Trailer & Equipment Co. v. Deal, 284 F.2d 567, 571 (5th Cir. 1960); Fed. R. Evid. 408 advisory committee note. The government is to be commended, not criticized, for deciding not to litigate those of the vast number of air traffic contoller cases pending before the Board in which it concluded that its likelihood of success was so small as to make continued litigation unwise.

B. The petitioners next contend that the Administration denied them equal protection because, due to

friendship or personal favoritism, Administration officials notified other air traffic controllers, but not the petitioners, of their deadline shift for reporting to work. They rely upon Olshock v. Village of Skokie, 411 F. Supp. 257 (N.D. 111), aff'd, 541 F.2d 1254 (7th Cir. 1976). In Olshock, during a police officers strike the Village of Skokie took an informal poll to determine which officers might return to work. Those who said they would do so were notified that if they reported by a specific date, they would not be discharged, but merely suspended. The court held that

> [t]he failure of defendants to give all the 59 striking policemen notice that they would not be discharged if they reported for duty in uniform on or prior to July 13, 1975, and the failure of defendants to give said

> notice to the plaintiffs herein, constituted a failure to provide equal protection of the laws to plaintiffs within the meaning of and as required by the Fourteenth Amendment to the United States Constitution . . . .

Id. at 265.

The rationale of Olshock was that the Village unfairly had discriminated against those officers who were not notified that if they reported by the deadline, they would not be discharged, in favor of those who were notified. In that situation, the non-notified officers were not aware of the deadline and the consequences of failing to meet it. The air traffic controllers, however, were in a quite different situation, for we have held that

> [e]ach petitioner knew when his next regularly scheduled shift commenced and elected

> not to show up at that time. Having disregarded the initial 48 hour moratorium, petitioners can hardly complain that they were not specifically and personally notified that each had an opportunity to also disregard an extension of that moratorium.

Adams v. Department of Transportation, FAA, 735 F.2d 488, 491 (Fed. Cir.), cert denied, 105 S. Ct. 432 (1984).

The petitioners argue, however, that even if the Administration was not required to notify all the air traffic controllers of their deadline shifts, it could not selectively notify some but not others. The petitioners point out that Mr. Helms, the administrator of the agency, issued a "directive" that supervisors should encourage their friends to come back to work.

The Helms statement, however, did not relate to notifying controllers of their deadline shifts, but only urged supervisors to encourage controllers with whom they were friendly to return to work. In his testimony Mr. Cox, a supervisor at one of the towers involved, explained the scope and purpose of the Helms statement:

> Q. Now in this telecon, Mr. Helms advised that he did not want supervisors to be calling controllers as supervisors, is that right?
>
> A. That was not a directive. He suggested that the Agency -- he said the Agency was not going to instruct supervisors to make calls as supervisors to their people.
>
> Q. So he said that as far as the Agency's position was concerned, as a supervisor you were not being directed to call --
>
> A. That's correct.
>
> Q. Controllers, is that correct? But he did say that the Agency was

suggesting that supervisors call controllers as personal friends?

A. I think that's a little liberal. My interpretation of what I heard was that if you felt, and if you were ncerned about these people as friends -- he wasn't suggesting to call everybody as a friend. What he was saying is that if you had someone you were especially concerned about as a friend, that you could be influential with and answer questions, go ahead and give him a call.

C. The petitioners argue that the Administration "erroneously decided that 5 U.S.C. Section 7311 require[d] dismissal of any employee found guilty of striking." whereas that statute permitted the agency to impose a lesser penalty. We rejected a similar contention in Schapansky v. Department

of Transportation, FAA, 735 F.2d 477 (Fed. Cir.), cert denied, 105 S. Ct. 432 (1984), where we ruled that

> [w]hether removal is mandatory under 5 U.S.C. § 7311 or 18 U.S.C. § 1918 need not be here decided. Removal is permissible under those statutes and no statute prohibits removal of any who strike against the United States.

Id. at 485.

Similarly, in the present case we cannot find that the Administration abused its discretion or otherwise acted improperly in concluding that the appropriate penalty for the petitioners' illegally striking against the government was removal.

D. Two of the petitioners (Burkette, No. 85-1102, and Johnson, No. 85-1245) contend that their failure to report for work resulted

not from participating in the strike but because they were confused about their deadline shift for reporting. We have rejected similar claims in Anderson v. Department of Transportation, FAA, 735 F.2d 537 (Fed. Cir.), cert. denied, 105 S. Ct. 432 (1984); Adams v. Department of Transportation, FAA, 735 F.2d 488 (Fed. Cir), cert. denied, 105 S. Ct. 432 (1984); and Dorrance v. Department of Transportation, FAA, 735 F.2d 516 (Fed. Cir.), cert. denied, 105 S. Ct. 432 (1984). For the reasons given in those opinions, we also reject the claim here.

The decisions of the merit Systems Protection Board upholding the removal of the petitioners are affirmed.

AFFIRMED

(2)

NO. 86-661

Supreme Court, U.S.
F I L E D
NOV 13 1986
JOSEPH F. SPANIOL, JR.
CLERK

**IN THE SUPREME COURT
OF THE UNITED STATES
OCTOBER TERM, 1986**

JOHN PATRICK ALLEN, and ALEXANDRA GEORGEO,

Petitioners,

V.

OFFICE OF PERSONNEL MANAGEMENT, FAA,

Respondent.

SUPPLEMENTAL APPENDIX

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TABLE OF CONTENTS

Page

A. Decision of the Presiding Official of the Merit Systems Protection Board.....1

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD
WASHINGTON REGIONAL OFFICE

GERALD L. AGOLINI, ET AL 1

CASE NO. AT075281F2351
v. DATE: January 14, 1983

DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION

INTRODUCTION

Appellants filed appeals from the agency's actions removing them from the position of Air Traffic Control Specialist.

JURISDICTION

The actions appealed were effected under subpart D of Part 752 of the Office of Personnel Management rgulations, which was promulgated pursuant to OPM's authority under 5 U.S.C. § 7514. The record reflects

that appellants were covered employees as defined by subpart D, and were entitled to appeal these actions to the Board. See 5 U.S.C. §§7511(a)(1)(A), 7512, 7513(d); 5 C.F.R. §§752.401(a), 752.401(b)(1), 752.405(a). I therefore find that the appeals are properly before the Board for adjudication.

ANALYSIS AND FINDINGS

The agency proposed appellants' removals on the basis of two charges: (1) participation in a strike against the United States Government in violation of 5 U.S.C. §7311 and 18 U.S.C. §1918; and (2) unauthorized absence. Both charges stem from appellants' failure to report for duty on various dates in August of 1981.

The Board has taken official notice of the fact that members of the Professional Air Traffic Controllers Organization (PATCO) engaged in an illegal strike against the Federal Government from August 3, 1981 through at least August 6, 1981. Ketchem v. Department of Transportation, MSPB Docket No. DAO75281F0713 (5/28/82). In addition, the Board has found that an employee's unauthorized absence during the period of such a strike may constitute a prima facie case of said employee's participation therein. Schapansky v. Department of Transportation, MSPB Docket No. DAO75281F1130 (10/28/82); Jones v.Tennessee Valley Authority, MSPB Docket No. ATO7528010300 (2/19/82); Ducket and Yardley v. Tennessee Valley Authority, MSPB Docket No. ATO7528010325 (2/19/82).

Striking has been defined as the "actual refusal in concert with others to provide services to one's employer." United Federation of Postal Clerks v. Blount, 325 F. Supp. 879 (D.D.C.), affirmed, 404 U.S. 802 (1971). In Ketchem, supra at page 9, the Board stated that where an employee is charged with participation in the PATCO strike "on dates subsequent to August 6, 1981, the agency bears the burden of proving by direct evidence that a strike was in fact in progress on the date charged, and that the employee could have returned to work on that date." In this regard, there is no dispute that an employee who failed to report for his or her "deadline shift" (the first regularly scheduled shift after 11:00 a.m. on August 5, 1981), would not

have been returned to an active duty status if he or she attempted to return after his or her deadline had passed. While picketing and other "strike activity" continued for several weeks, or even months, after August 6, 1981, the agency effectively ended any particular employee's participation in the strike after the employee had missed the "deadline shift", and no longer had an opportunity to "provide services", per se. My findings below with respect to the striking charge will therefore be limited to each appellant's duty days from August 3, 1981 through the date of his or her "deadline shift". This same rationale, however, is inapplicable to the charge of unauthorized absence. Notwithstanding the fact than an employee would not have been placed in an active duty

status if he or she attempted to return to work after his or her deadline had passed, such an employee could have been entitled to be placed in a non-duty status, with pay. At a minumum , any absences on and after the date that the agency rebuffed his or her offer to return to work would be "authorized", regardless of the pay or leave status recorded by the agency. However, unless the employee appeared for duty, or otherwise communicated to the agency a desire to return to work, I find that the agency

could validly charge the employee with unauthorized absence on previously scheduled duty days subsequent to his or her deadline.

The agency presented the testimony of the Chief or Deputy Chief of each of

the three facilities involved, and/or documentary evidence (watch schedules, sign-on logs, memoranda and/or time and attendance records) to establish that each of the appellants was absent without authorization on one or more of her "deadline shift". I find this evidence to be sufficient to establish a prima facie case of strike participation with respect to each of the appellants. In light of this finding, the burden of persuasion now shifts to each appellant to show that he or she "had no knowledge of the existence of the strike or to demonstrate that his [or her] absence was due to some factor other than intentional participation in the strike." Schapansky , supra, at 6. In this regard, several of the appellants did allege specific reasons for their absences. Each will be addressed below.

William Sedgwick became a member of PATCO's national negotiating team in June of 1980 and, prior to August of 1981, he made several trips to Washington, D.C. in connection with contract negotiations. On each of these occasions, he received prior approval from his Chief John Atkinson, who authorized the issuance of a Government Travel Request (GTR) for appellant's airline tickets and, if time allowed, the issuance of a travel advance. Appellant claims that he went to Washington, D. C. on August 2, 1981 based upon a July 30 or 31, 1981 communication from Robert Poli, President of PATCO National. He testified that he did not request Mr. Atkinson's approval of the trip because Mr. Poli had told him to keep

it a "secret", and because Mr. Atkinson had once told him that he need not get his approval in advance if he got a "last minute" call. He also testified that he believed himself to be on admininistrative leave on and after August 3, 1981.

I find Mr. Sedgwick's explanation of his absences to be incredible for several reasons. There was no "last minute" notice of the trip. Appellant knew of the trip 2-3 days prior to his departure, yet did not request Mr. Atkinson's approval. Nor did he subsequently contact Mr. Atkinson to obtain approval as he was supposed to under his own "last minute" scenario. In addition, the agency submitted an affidavit from the Director of FAA's Office of Labor Relations who stated that PATCO had not requested nor had

his office approved, the attendance of Mr. Sedgwick at any negotiating sessions after June of 1981. (Agency Ex. 4). On cross examination, appellant admitted that he attended no negotiating sessions in August of 1981, but rather was waiting to review any proposed contract. Had the trip been authorized, there would have been no reason to keep it a "secret". I therefore find that appellant's trip and his absences on and after August 3, 1981, were unauthorized, and that appellant was so aware. I further find that his absences were not the result of any belief on his part that

he was on administrative leave. Harold Jacobs called his facility on August 5, 1981 and was informed that his previously approved annual leave was cancelled and that he was to report for his next scheduled shift at 8:00

a.m. on August 7, 1981. Appellant testified that he arrived home at approximately 1:00 a.m. following a lengthy drive from Pennsylvania. He stated that he felt that he would be too tired to work at 8:00 a.m., and that he attempted to call his facility, but the line was busy. He then called a member of his carpool who told him that he should come down to the union hall to find out what had been going on over the past several days. Appellant testified that he went to the union hall at approximately 3:00 a.m., and heard that some controllers had been told that they were already fired. He claims that he therefore believed that he had also been fired, and proceeded to return home and go to bed.

Mr. Jacobs' stated reason for not

reporting for work on and after August 7, 1981 could be termed ridiculous, but it is, at best, incredible. He admits that he had been told that he could, and should, report for duty on August 7, 1981. Yet he allegedly relied upon hearsay and rumors regarding other controllers' situations in deciding not to report for duty on August 7, 1981 or any date thereafter, or even contact the facility again. No reasonable person, particularly one such as appellant with over 25 years of service, would effectively abandon his employment on the basis of such information. I therefore find that appellant's absences on and after August 7, 1981 were not the result of any belief that he had been fired prior to that date.

James Rushing was on sick leave on

July 31 and August 1, 1981, and had a regular day off on August 2, 1981. He claims that he continued to be ill, and believed himself to still be on approved sick leave until he allegedly attempted to return to work on August 6, 1981. However, appellant's team supervisor testified, and a call record in the file reflects, that he informed appellant on August 1, 1981 that in the event of a strike on August 3, 1981, all leave would be cancelled and that appellant was required to either call in or report for duty. Appellant did neither. Moreover, appellant did not mention his claim of continued illness and entitlement to sick leave in either his reply to the proposal notice or in his appeal to the Board. I therefore find that appellant did not in fact believe himself to be on approved sick

leave at any time after August 2, 1981.

As noted above, Mr. Rushing claimed that he attempted to return to work on August 6, 1981. Mr. David Boyce makes the same claim. Both testified that they were turned away by a guard, and thereby, prevented from reporting for their "deadline shifts". At the outset, I note that neither one of them bothered to include any information regarding these alleged incidents in either their replies to the proposal notices or in their petitions for appeal to the Board.

Both admit that they did not identify themselves to the guard, who was not an employee of the agency, and neither one bothered to call the facility after he was allegedly turned away. In addition, Mr. Reisterer, an agency

employee who was involved in security at the facility, testified that the contract guards on the gate were not authorized to turn anyone away. He testifed that the guards had a list of those persons who had already missed their deadlines, and that if any of those persons wanted to enter, the guards were to contact agency security personnel. If either appellant had, in fact, attempted to report prior to his deadline, he would have been allowed to enter. In light of the foregoing, particularly the inordinate amount of time which passed before either appellant raised this claim, I find that neither's absence on and after August 6, 1981 was the result of an inability to enter the facility.

Five of the appellants (Buesser, Gammon, J. Harris, O'Dea and Spinks)

claim that they were on previously-approved leave on some of the dates covered by their proposal notices. However, three of them (J. Harris, O'Dea and Spinks) were informed prior to August 3, 1981 that in the event of a strike, all leave would be cancelled. (Agency Files, Tabs 13). The agency's attempts to communicate this same information to appellants Buesser and Gammon was apparently unsuccessful. However, both of them were clearly due to return to duty on August 9, 1981, the day before the issuance of their proposal notices. None of these appellants testified at the hearing before me, nor otherwise presented evidence regarding the reasons for their absences from duty. I therefore find that each of them was absent without authorization during the

strike.

With respect to those appellants whose leave was cancelled by the agency, their representative contends that such cancellations were not permitted under the agency's negotiated agreement with PATCO. (Appellants' Ex. FF) I note that section 5 of Article 28 of the Agreement does state that approval of leave "shall not be subject to conditional curcumstances." However, section 1 of the same Article provides that leave may be cancelled in the event of an "operational emergency". Moreover, the agency points out that Article 41 of the Agreement provides that the agency retains all rights preserved under 5 U.S.C. a7106, which provides, in part, that an agency may "take whatever actions may be necessary to

carry out the agency mission during emergencies." I can think of few other situations which would better qualify as an emergency than the mass absence of the majority of an agency's work force. I therefore find that the agency could, and did, validly cancel previously-approved leave.

As to all appellants who were formerly employed at the Jacksonville Air Route Traffic Control Center (Hilliard), their representative argued that the time and attendance record in each appellant's file was potentially inaccurate; that the watch schedules were not needed to verify their accuracy; and that the agency had not included them in its adverse action files. In this regard, the Center Chief testified that he did not rely on the watch schedules during his

decision-making process. However, during the hearing, the agency did produce the appropriate watch schedule for each of the 65 appellants in question, and their representative had an opportunity review them. He subsequently submitted the watch schedules of four of the appellants (Buesser, Gammon, J. Harris and Jacobs), and I did consider them in reaching my findings above. In light of the fact that the representative did not submit the remaining 61 watch schedules, I presume that he felt that they contained no exculpatory information.

I find that the agency has established a prima facie case of strike participation with respect to all of the appellants, and that none of them has presented persuasive evidence in

rebuttal. The same evidence establishes that appellants were absent without authorization, as alleged. I therefore find that the charges as set forth in the proposal notices are supported by a preponderance of the evidence, and are sustained.

Appellants raise several procedural arguments. In this regard, they bear the burden of proving error by the agency in the application of its procedures, and that said error was harmful. 5 U.S.C. §7701(c)(2)(A); 5 C.F.R. §1201.56(b)(1). They must show

that in the absence or cure of such error, the agency might have reached a different conclusion. 5 C.F.R. §1201.56(c)(3); Parker v. Defense Logistics Agency, 1 MSPB 489 (1980).

Appellants contend that they received insufficient notice of the agency's actions. In this regard, 5 U.S.C. §7513(b)(1) provides that an employee is entitled to "at least 30 days' advance written notice, unless there is reasonable cause to believe the employee has committed a crime for which a sentence of imprisonment may be imposed, stating the specific reasons for the proposed action." In these cases, the agency did have reason to believe that appellants had violated 18 U.S.C. §1918, a statute authorizing imprisonment for up to one year and a day. I therefore find that the agency was warranted in shortening the notice periods in the instant cases, and that no procedural error was involved, as alleged. Schapansky, supra at 8.

Numerous appellants claim that they received less than seven days in which to present their oral replies, and that this constituted reversible error on the part of the agency. 5 U.S.C. §7513(b)(2) provides that an employee is entitled to "a reasonable time, but not less than 7 days" to reply orally and in writing. In Ratley v. Department of the Army, MSPB Docket NO. ATO7528110338 (9/17/82), the Board stated than an action "taken without complying with the procedural requirements of 5 U.S.C. §7513(b)(2) clearly constitutes harmful error under 5 U.S.C. §7701(c)(2)(A)." In that case, the employee was given only one day to reply to a proposed suspension notice. However, in the instant cases, each of the proposal notices stated that the employee was

entitled to seven days in which to reply. Thus, there was no initial "denial" of a seven-day reply period as there was in Ratley. Each appellant raising this issue claims that the reply period was effectively shortened when the agency scheduled his or her oral reply on a date which was less than seven days after receipt of the proposal notice. The fact situations in these cases are substantially similar to the facts in the case of Johnson v. Department of the Treasury, MSPB Docket No. DC075209213 (8/27/82) where the agency issued its decision on a proposed suspension six days after the employee received the proposal notice. In its decision, the Board stated that the doctrine or harmful error was applicable to such a situation, and that the appellant in that case had

not demonstrated any prejudice to her ability to respond to the charges, nor shown that the effective shortening of the reply period "likely had a harmful effect upon the outcome before the agency." Id. at 4.

Of the 42 appellants who initially raised this issue, at least 19 of them (Agolini, Blackwell, Boyce, Crow, Donaldson, Farris, Gilbert, Hodges, Jacobs, Johnson, Kitchens, Lovins, Manges, Norman, N. O'Donnell, Prescott, Sweeney, Wilson and O. Wright), each received a copy of his or her proposal notice at least seven days prior to the date scheduled for his or her oral reply, as evidenced by postal receipts in the agency files, and/or statements made in appellants' petitions for appeal. I therefore dismiss the allegation with respect to

these appellants. Not one of the other 23 appellants in question has attempted to show that his oral reply would have been any different if he had been afforded additional time. Moreover, I note that the "script" of the oral reply was substantially the same in each case, regardless of the number of days between receipt of the proposal notice and the oral reply. I therefore find that even absent any "shortening" of the reply periods, it is unlikely that the agency would have reached a different conclusion with respect to any of the appellants in question, and that any error by the agency in this regard was harmless. Johnson, supra; Messersmith v. General Services Administration, MSPB Docket NO. DCO7528010253 (12/2/81).

25 of the appellants claim that they

"were denied the right to have a representative at their oral reply." In this regard, teach of these appellants submitted a written reply, and that he or she had been scheduled for the oral reply, and that he or she had been unable to remain at the agency past a certain time due to "personal reasons". Each written reply also stated that the appellant immediately requested a rescheduling of his or her oral reply, and that said request was denied. However, a written reply is hearsay, and does not constitute evidence of the matters stated therein in cases where there is an evidentiary hearing, and the party has an opportunity to testify. Pelham v. Department of the Treasury, MSPB Docket No. DAO75209140 (12/4/81). All of these appellants had such an opportunity, but only one, Mr.

Rushing, presented any testimony at the hearing. With respect to this issue, Mr. Rushing testified that at approximately 4:30 p.m. on the date scheduled for his oral reply, he was told by appellant Eugene O'Donnell that the PATCO representatives could not stay any longer. On cross examination, he admitted that he made no request for a rescheduling of his oral reply, and, in fact, had no contact with any agency officials on that day. He stated that he was told that this representative made an oral request for rescheduling, but that he was not present when this request was allegedly made. He also stated that he was informed the following day by one of the PATCO representatives that there would be no oral reply in his case.

Mr. Rushing's testimony is at variance with the statements made in his written reply that he immediately requested a rescheduling of his oral reply and that the agency denied said request. Moreover, he has submitted no direct evidence of any statements or actions by agency officials on the scheduled date of his oral reply, or thereafter, which would show that the agency denied him an opportunity to submit an oral reply. I therefore find that none of the appellants in question, including Mr. Rushing, has shown any error by the agency, as alleged. However, even assuming that the agency did deny any requests for rescheduling, and that said denials were not warranted under the circumstances, appellants have not shown that their oral replies, if made, would have been any different

than the replies made by other appellants hving PATCO representatives, at which the employees stood "mute" with respect to charges. In such an instance, it is unlikely that the agency would have reached a different conclusion with respect to any of these appellants. I therefore find that even if the agency erred, as alleged, such error was harmless. Messersmith, supra.

All of the appellants allege that the agency committed harmful procedural error in that they were denied a meaningful opportunity to make oral and written replies. They claim that the deciding officials were "stripped of the power to mitigate the penalty" by virtue of President Reagan's statement that any air traffic controllers who did not report for

duty within the grace period "have forfeited their jobs and will be terminated." See Air Traffic Controllers Strike, 17 Weekly Comp. Pres. Doc. 845 (Aug. 3, 1981). There is no dispute that once a deciding official determined that any given employee had participated in the strike and had not returned during the grace period, the only penalty which he could impose was removal. In this regard, the questions of mitigation and propriety of the penalty in these cases will be addressed below. However, with respect to the allegation of procedural error, the absence of authority to mitigate, as in a case involving a statutorily mandated penalty for a given offense, in no way diminishes the right to reply to charges set forth in a proposal notice. Woody v. General

Services Administration, MSPB Docket No. SFO7528110028 (6/2/81). The deciding officials in these cases had both the authority and the responsibility to determine whether each of the appellants had engaged in the conduct set forth in the charges. (GENOT 141, Appellants Ex. D). I find that each of the appellants had the opportunity to provide meaningful input into those determinations, had he or she so desired. I therefore find no error, as alleged.

Appellants also claim that they were subjected to de facto suspension during the notice periods of the removal actions. In this regard, they claim that they were "locked out" by the agency, and that the agency was therefore unwarranted in continuing to carry them as AWOL on those previously

scheduled duty days during the notice periods. Specifically, they contend that the agency's actions constituted suspensions of more than 14 days, which are appealable to the Board under the same statutory and regulatory provisions as the removal actions, and that the agency failed to afford them any procedural rights in connection therewith. As with any allegedly appealable action, the appellants have the burden of proof with respect to the Board's jurisdiction. 5 C.F.R. §1201.56(a)(2).

Under the agency's own regulations (Chapter 2, Paragraph 206, Section a(5) of FAA Order No. 3770.2B - Appellants' Exhibit AA) an employee is normally entitled to be retained in an

active duty status during the notice period of an adverse action. This presumes that the employee is ready and willing to work. The institution of adverse action proceedings does not suspend the agency's authority to administer its leave policies, including the charging of AWOL for unauthorized absences on previously scheduled duty days. In the instant cases, appellants were not "locked out", as that term is used in the private sector. The agency did not suspend its operations, but rather continued to perform its mission despite the drastic reduction in available manpower. Moreover, appellants knew that they were still employees of the agency during this time, particularly in light of the "proposed" nature of the notices which they received. None of these

appellants reported for duty or otherwise communicated wo the agency a willingness to return to work during the notice period. Had they done so, and if the agency had subsequently placed them, "for disciplinary reasons, in a temporary status without duties and pay", I could find that the agency had effected suspensions as defined by 5 U.S.C. §7501(2). However, the AWOL charges in question appear to have been nothing more than the logical consequences of appellants' continued unauthorized absences, and such charges, in and of themselves, are not appealable to the Board. Barger v. Department of Justice, MSPB Docket No. SEO75209019 (4/21/82); Marks v. Department of the Air Force, 3 MSPB 17 (1980). I therefore find that appellants have failed to meet their burden of proof

with respect to the Board's jurisdiction.

Notwithstanding my findings with respect to the Board's jurisdiction, I find appellants' "appeals" of the alleged suspension actions to be untimely. 5 C.F.R. §1201.22(b) requires that a petition for appeal be filed within 20 days after the effective date of the action being appealed. Appellants did not "identify" the alleged suspensions until after the regulatory time limit for appeal had expired. Appellants claim that their untimely "identification" is permissible under 5 C.F.R. §1201.24(a)(9) which states, in part, that "[f]ailure to raise a claim or defense in the petition shall not bar its submission later unless to do so would prejudice the rights of

the other parties and unduly delay the proceedings." However, appellants' removals were not based upon any absences subsequent to the issuance of the proposal notices, and the AWOL charges in question do not constitute a "claim or defense". They are, as appellants state, alleged suspensions. As such, they are subject to the same filing requirements as any other allegedly appealable actions, including the regulatory time limit for appeal. I therefore find that appellants' "appeals" of the alleged suspension actions were untimely filed, and that the record reflects no basis upon which to waive the time limit for appeal pursuant to 5 C.F.R. §1201.12.

Appellants claim that they were subjected to disparate treatment in

that some employees who were striking during the period of August 3-5, 1981 were allowed to return to work by reporting at or before the time of their "deadline shift". However, the agency made no determination as to whether an employee had been striking August 3, 4 or 5, 1981 if he or she reported during the grace period. (Appellants Ex. M, P 49, Agency's Answer to National Interrogatory No. 21). Absent such a determination by the agency or some other competent authority, appellants' claim is based upon the presumption of a fact not in evidence. Moreover, as in any case involving a claim of disparate treatment with respect to the imposition of discipline, appellants must show that the alleged disparity involved similarly situated employees. Kuhlmann v. Department of

Health and Human Services, MSPB Docket NO. SLO7528010027 (2/23/82). In this regard, appellants' own allegation sets forth a dissimilarity of situations with respect to one fact that is in evidence, i.e., appellants did not return. I therefore find no disparity, as alleged.

Unauthorized absence, by its very nature, disrupts the efficiency of the service. Chiaverini V. United States, 157 Ct. Cl. 371 (1962); Desiderio v. Department of the Navy, 4 MSPB 171 (1980). As cited by the agency, strike participation by a Federal employee is violative of both civil and criminal statutes. 5 U.S.C. §7311(3) provides that an individual may not hold a position in the Federal Government if he participates in a strike. This has been held to

establilsh removal as the mandatory penalty for strike participation. American Postal Workers Union v. United States Postal Service, 628 F. 2d 1280 (9th Cir. 1982). In Schapansky, supra, the Board did not answer the question as to whether it had authority to mitigate what appears to be a statutorily mandated penalty. Rather, the Board found that in light of the nature and gravity of the offense of striking, as well as the direct, deleterious effects such conduct has on the efficiency of the service, mitigation of the penalty would not be warranted under the standards set forth in Douglas v. Veterans Administration, MSPB Docket No. ATO75299006 (4/10/81). I therefore find that the agency's penalty selections in these cases were both reasonable and appropriate.

In summary, I find that the agency effected appellants' removals for such cause as will promote the efficiency of the service, 5 U.S.C. §7513(a).

DECISION

The agency's actions are hereby affirmed.

NOTICE

This is an initial decision and will become a final decision of the Merit Systems Protection Board on Feb. 18, 1983 unless a petition for review is filed with the Board.

Any petition for review must be filed with the Board within thirty-five (35)

calendar days after the issuance of this decision.

Any party to this appeal, the Director of the Office of Personnel Management (OPM) and the Special Counsel may file a petition for review of this decision with the Merit Systems Protection Board. The Director may request review only if he or she is of the opinion that the decision is erroneous and will have a substantial impact on any civil service law, rule or regulation under the jurisdiction of OPM. 5 U.S.C. §7701(e)(2). The petition must specifically identify the exception taken to this decision, cite the basis for exception, and refer to applicable law, rule or regulation.

The Petition for review must be filed

with the Office of the Secretary, Merit Systems Protection Board, Washington, D. C., 20419 no later than thirty-five (35) calendar days after issuance of this decision. If a petition for review is filed, an informational copy of it should be forwarded to this office.

The Board may grant a petition for review when a party submits written argument and supporting documentation which tends to show that:

(1) New and material evidence is available that despite due diligence was not available when the record was closed; or

(2) The decision of the presiding official is based upon an

erroneous interpretation of statute or regulation.

Under 5 U.S.C. §7703(b)(1)* an appellant has the right to seek judicial review of the Board's final decision in this appeal. A petition requesting such review must be filed with the United States Court of Appeals for the Federal Circuit no later than 30 days after appellant's receipt of the Board's final order or decision.

For the Board:

Joseph E. Clancy
Presiding Official

* As modified by § 127 of the Federal

Court Improvement Act of 1982, to be codified at 28 U.S.C. §1295(a)(9).

APPENDIX

HILLARD, FLORIDA,

NAME	CASE NO.
Agolini, Gerald L.	ATO75281F2351
Allen, John P.	ATO75281F2352
Baran, Frank J.	ATO75281F2353
Batick, Kenneth R.	ATO75281F2356
Blackwell, Gerald V.	ATO75281F2359
Boyce, David E., Jr.	ATO75281F2362
Bright, Joseph W.	ATO75281F2364
Bronson, Jay C.	ATO75281F2366
Buesser, George R.	ATO75281F2370
Campbell, Joseph C.	ATO75281F2372
Carey, John A., Jr.	ATO75281F2373
Catron, James B.	ATO75281F2374
Corcoran, Christopher M.	ATO75281F2376
Cruess, Frederick W.	ATO75281F2380
Dancho. Robert E.	ATO75281F2383
Diedrick, Marvin J.	ATO75281F2384
Dippy, Alan D.	ATO75281F2385
Donaldson, Peter R.	ATO75281F2386
Dowe, William A.	ATO75281F2388
Gammon, Thomas L.	ATO75281F2394
Georgeo, Alexandra J.	ATO75281F2396
Gilbert, Warner H.	ATO75281F2397
Gordon, David L.	ATO75281F0098
Griffin, Gordon E.	ATO75281F2400
Guldi, James E.	ATO75281F2401
Harris, Joseph P.	ATO75281F2404
Harris, Michael D.	ATO75281F2405
Harris, William C.	ATO75281F2406
Hicks, William R.	ATO75281F2408
Hodges, Louis D.	ATO75281F2409
Horton, O. Curtis	ATO75281F2411
Huddleston, Sam F., Jr.	ATO75281F2413
Jacobs, Harold E.	ATO75281F2417
Johnson, Charlie L.,Jr.	ATO75281F2418
Jones, Terry Lee	ATO75281F2419
Keith, Robert	ATO75281F2421
Kitechens, Henry R.	ATO75281F2423
Levings, John C.	ATO75281F2430

Lopez, Anthony F.	ATO75281F2432
Lovins, Michael L.	ATO75281F2433
Millonzi, Lance M.	ATO75281F0922
Morris, Roderick D.	ATO75281F2440
Meuller, Michael J.	ATO75281F2441
Nocito, Robert	ATO75281F2442
O'Dea, John P.	ATO75281F2444
O'Donnell, Eugene P.	ATO75281F2445
O'Keefe, Timothy M.	ATO75281F2446
Olin, Oscar N.	ATO75281F2447
Paulsen, Wayne P.	ATO75281F2449
Reaser, James P.	ATO75281F2454
Rice, Ronald L.	ATO75281F2457
Runion, Charles, C.	ATO75281F2463
Rushing, Jimmy D.	ATO75281F2464
Sheekey, Bruce P.	ATO75281F2467
Spinks, Benjamin H.	ATO75281F2470
Swain, Phillip A.	ATO75281F2473
Tomlin, Gloria J.	ATO75281F2479
Von Dane, James A.	ATO75281F2480
Wall, Gary T.	ATO75281F2482
Walls, Quincey T.	ATO75281F2483
Wheeler, James W.	ATO75281F0046
Wiggins, William N.	ATO75281F2489
Woodham, Sanford G.	ATO75281F2490
Wright, Richard A.	ATO75281F2491
Yochem, Larry D.	ATO75281F2493

JACKSONVILLE, FLORIDA, ATCT

Abrams, Richard P.	ATO75281F2498
Brakenwagen, Frank E.	ATO75281F0939
Britton, Harry A.	ATO75281F2502
Brooks, Jimmy L.	ATO75281F0940
Burchett, Rodney N.	ATO75281F2503
Carr, Robert J.	ATO75281F2504
Connors, Dennis B.	ATO75281F2505
Crow, John F.	ATO75281F2506
Denney, Douglass L.	ATO75281F2507
Eason, Dennis J.	ATO75281F2509
Farris, Frederick H.	ATO75281F2509
Hetherington, W. R. Jr.	ATO75281F2513
Hogan, John T.	ATO75281F2514
Lane, Hale A., Jr.	ATO75281F2515

Manges, James R.	ATO75281F0935
Medders, Jerry W.	ATO75281F2517
Nelson, Steven W.	ATO75281F0936
Norman, Leona O.	ATO75281F2519
Prescott, Kenneth V.	ATO75281F2522
Rast, Robert E.	ATO75281F2523
Russell, Edgar R.	ATO752812524
Sweeney, William F.	ATO75281F2526
Thomas, Arthur H., Jr.	ATO75281F2728
Whiteley, John C., Jr.	ATO75281F2729
Wilson, Harold	ATO75281F2529
Wright, Orville L.	ATO75281F2530

JACKSONVILLE (CRAIG), FLORDIA, ATCT

Manning, John A., Jr.	ATO75281F2495
O'Donnell, Nancy J.	ATO75281F2496
Sedgwick, William T.	ATO75281F2497

* Represented by David R. Siegel

FOOTNOTES

1 This decision encompasses the appeals of 94 former air traffic controllers, 91 of whom are represented by the firm of Leighton, Conklin, Lemov, Jacobs & Buckley. The remaining three appellants are represented by Mr. David E. Siegel. Appellants' names and case numbers appear in the attached appendix.